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TREATIES, STATUTES AND RULES

CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.

C. H. DUNN, PETITIONER,

versus

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA WITH BRIEF IN SUPPORT THEREOF.

The petitioner, C. H. Dunn, respectfully presents to this Court this petition and prays that a writ of *certiorari* issue to the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled cause, No. 7652, on June 28, 1940, and the opinion filed therewith, and the judgment of that Court entered July 30, 1940, denying a rehearing, affirming a judgment of the District Court of the United States for the District of Columbia in Civil Action No. 4200, dismissing the complaint.

OPINION BELOW.

The opinion of the Court of Appeals (R.,) will be reported in 71 App. D. C. ; F. (2d) ; 68 W. L. R. .

STATEMENT OF THE CASE OR MATTER INVOLVED.

The petitioner filed an application with the local Register of the Land Office at Los Angeles on August 18, 1938, for a preferential oil lease under Section 17 of the amended act of August 25, 1935, which section provides that the oil "may" be leased, which is believed mandatory under the decisions of this Court.

The Register refused the application because the surface land had been patented by the Government. The so-called patent referred to by the Register, it is alleged, did not pass the minerals, oils and gases under the surface. Petitioner filed a timely appeal with the Commissioner of the Land Office, the Commissioner stating that he had no authority to receive same. Petitioner then filed a timely appeal with the Secretary for a supervisory review of the decision of the Commissioner.

The patent set up by the Commissioner against the petitioner's application is one under a Mexican land grant. *Nine other applications* were filed by different parties *cooperating* with the petitioner, seeking leases for oil where the surface had been patented under several different land grant acts, in all of which applications it is contended the oil was reserved—rather, did not pass with the patent—in accordance with the long established policy of the United States. *One of the applicants sought a lease where a part of the land had not been patented.* These nine other applicants all followed the same course as did petitioner, and shortly after October 30, 1938, the petitioner and other applicants began to "persistently urge" the respondent to grant them a hearing on the applications, which was refused.

At the time of the filing of these ten applications and prior thereto there was a standing order with the local Register from the respondent, and he noted it on some of the applications, that he was not to receive any applications for oil leases under land where the surface had been patented; this is not alleged, but the lower court took judicial notice of it under its decisions hereinafter cited.

About January 1, 1939, the respondent suggested that the petitioner and the other nine applicants file a brief, which they did on January 4, 1939. Thereafter, despite the continual urgings of the petitioner and the other applicants, the respondent refused to give a hearing and refused to take action on the application. On August 30, 1939, the respondent denied or indefinitely postponed a hearing on the ten applications and refused to act on and decide any of them. The present action was filed September 2, 1939, for the benefit of the petitioner and also as a test case for the benefit of the other nine applicants, as it was thought that if the Court granted the relief sought in this case, the Secretary would grant it in the other cases.

The record in the Land Office shows that the respondent had, more than a year prior to the filing on August 18, 1938, of the petitioner's application, indefinitely *suspended* all actions *on 28 similar applications* filed by Harold Toplon and others, being Serial Nos. Los Angeles 052902 to 052929, both inclusive. This is important because the respondent takes the position that he suspended action on the petitioner's application because of Congressional resolutions introduced in the House and Senate in the spring of 1939, respondent's letter so stating being made a part of the lower court's opinion, although it was not part of the record except by judicial notice.

The Secretary of the Navy, with whom the Secretary of the Interior joined last year, took the position that the Government owned all the oil in the three-mile limit be-

yond low tide water and asked Congress to authorize a suit to declare same.

The petitioner requested a rehearing and modification of the Court of Appeals' opinion and judgment of June 28, 1940, as there seems some doubt whether or not that Court's decision would be *res judicata* against any review of the decision of the respondent which he might later make denying the lease, and requested the Court to modify the opinion and judgment and to make them *without prejudice* to the right of the petitioner to have a later unfavorable decision of the respondent reviewed by the Courts. This the Court of Appeals refused to do, and also refused to make the judgment without prejudice as to petitioner's right later to require the respondent to take action in the event that he arbitrarily or capriciously or without cause or reason continued to hold the case in suspension.

JURISDICTION.

Petitioner filed a complaint in the District Court for orders in the alternative in the nature of a mandamus (R., 1), requiring the respondent to (a) grant her a hearing on an application for an oil lease she had pending before the respondent, and (b) to then require the respondent to speedily take final action on and decide the application, or (c) in the alternative require the respondent to issue to the petitioner the oil lease applied for.

The District Court sustained a motion to dismiss because no cause of action was stated and the court was without jurisdiction (R.,). The Court of Appeals affirmed.

The District Court had jurisdiction under D. C. Code 1901, sec. 61 (1929), Title 18, sections 41, 43 and 44; 36 Stats. 1167, c. 231, sec. 289. The Court of Appeals had jurisdiction under D. C. Code 1901, sec. 226 (1929, Title 18, sec. 26; 41 Stats. 1312, c. 125, sec. 12).

The judgment of the Court of Appeals sought to be reviewed by this Court was entered June 28, 1940 (R.,), and a rehearing was denied July 30, 1940 (R.,). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

There are five principal questions involved. The first is whether the courts have jurisdiction to review the action of the Secretary of the Interior in refusing to grant an application for an oil lease under the amended Act of August 21, 1935 (49 Stats. 674; 30 U. S. C. A. 221, 226), the lower courts having held that the courts have no such jurisdiction and that the Secretary's action is not reviewable.

Another question is whether, where applications for such leases are filed and the Secretary refuses to act and indefinitely postpones action on said leases, the courts cannot require the Secretary to act unless it is shown that he has acted arbitrarily and capriciously in refusing to act on the application, the lower courts having held that he could not be required to act here, although the petitioner's and *nine* other applications like hers had been pending for a year before the suit, and *twenty-eight other similar* applications had been suspended by the Secretary for a *year prior* to the *filing* of the *petitioner's application*, because after the petitioner's application had been filed some six months there were resolutions introduced in Congress seeking to authorize the Attorney General to bring suits on behalf of the United States to determine whether or not oil under the surface, beyond low water mark on the Pacific Ocean out to the three-mile limit, belongs to the United States, which resolution and suit do not affect the present applications, as they are for oil leases above high water mark. The lower courts took judicial notice of the other

applications and of a letter from respondent to petitioner's counsel—and made it part of the opinion by a footnote (R.,).

The third question is, if the lower courts acted properly in dismissing the complaint, whether the complaint should have been dismissed as it was and became *res adjudicata,* or whether it should have been dismissed without prejudice later to seek to require the Secretary to act and in the event of his acting unfavorably, for the court then to review his action in denying the application for the oil lease.

The fourth question is whether the Secretary can deny an oral hearing on an application for such oil leases under the statute, and whether such denial is a denial of due process of law.

The fifth question is whether the oil and other minerals under a patent issued on a Mexican land grant under the act of March 3, 1851 (9 Stat. 631) and the amendment thereto of January 10, 1854 (10 Stat. 603) belongs to the United States under its well established policy that no gas or oil passes under a patent unless specifically so stated in the statute or grant authorizing the gas and oil to pass to the patentee.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals has decided a question of general importance as well as substance relating to the construction of the amended act of August 21, 1935, which has not been, but should be, settled by this Court.

2. The Court of Appeals has not given proper effect to the applicable decisions of this Court construing the Mexican treaty and the act of March 3, 1851, as amended January 10, 1854.

3. The Court of Appeals, by following the Roughton case, has construed the word "MAY" in section 17 of

the amended act of August 21, 1935, as permissive contrary to the rule for construing that word as enunciated by this Court in a case, quoted hereinafter, when the rights of a citizen and the authority of a public official are involved. This court there held words, "may, if deemed advisable", to be mandatory on public officers (4 Wall. 435).

ASSIGNMENTS OF ERROR.

I.

The court erred in holding that it did not have jurisdiction of the cause of action alleged.

II.

The court erred in holding that the Petitioner is not entitled to an oral hearing before the Secretary on her application for an oil lease.

III.

The court erred in refusing to order the Secretary to take action on the application of the Petitioner for an oil lease, it being alleged and admitted by the motion to dismiss that the application was before the Secretary for nearly one year and then he refused or failed to take action.

IV.

The court erred in refusing to order the Secretary to issue an oil lease to the Petitioner on her application, as the issuance of such lease is a ministerial duty on the part of the Respondent and is mandatory and he refused to act.

V.

The court erred in refusing to require the Secretary to issue the oil lease applied for by Petitioner, as the oil for which the lease was sought is the property of the United States and not the property of the patentee, as the oil did not pass under the patent.

VI.

The Court of Appeals erred in not making its judgment without prejudice to the right of the petitioner to later request the Court to require the respondent to act if he continues to hold the application in suspension arbitrarily or capriciously or without reason or cause and also to require the respondent to issue the oil lease sought in the event that the respondent later denies the application.

VII.

The court erred in dismissing the action.

PRAYER FOR WRIT OF *CERTIORARI.*

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia to certify and send to this Court for its review and determination on a day certain, to be therein named, the full and complete transcript of the record and all proceedings in the cause entitled and numbered on its docket, C. H. Dunn, appellant, *vs.* Harold L. Ickes, Secretary of the Interior, appellee, No. 7652. That the said orders of the United States Court of Appeals for the District of Columbia may be reviewed and reversed by this Honorable Court and that your petitioner may have such other and further

relief in the premises as to this Honorable Court may seem meet and just. And the petitioner will ever pray.

RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
FRANK M. CHAPIN,
Attorneys for Petitioner.

September 18, 1940.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

OPINION BELOW.

The opinion of the Court of Appeals (R.,) will be reported in 71 App. D. C. ; F. (2d) ; 68 W. L. R.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The statement of the case or matters involved as set out in the petition, *supra* (p. 2) is adopted and made the statement of the case for this brief.

SPECIFICATIONS OF ERRORS TO BE URGED.

Each of the assignments of error which are set out in the petition, *supra* (p. 7), are relied upon and urged in this brief, whether specifically discussed or not.

SUMMARY OR ARGUMENT.

POINT I

Where the Register Refuses to Receive an Application for an Oil Lease and the Commissioner Rejects an Appeal to Him Therefrom, Then the Secretary on a Timely Appeal Is Required to Grant an Oral Hearing to the Applicant as Part of Due Process of Law and the Courts Can Require the Secretary to Grant Such a Hearing.

POINT II

Where Under Such Circumstances After a Brief Is Filed Before the Secretary by Applicants and the Secretary Denies a Hearing and Refuses to Decide and Take Final Action on the Application, the Courts Can Require the Secretary to Decide the Application and Take Final Action Thereon.

POINT III

The Issuance of an Oil Lease by the Secretary Under the Amended Act of August 21, 1935, is a Ministerial Duty and Is Required by Statute and on the Secretary's Refusal or Failure to Issue the Lease, the Courts Can Require Such Issuance.

POINT IV

The Secretary, as Well as the Courts, Can and Should Construe Mexican Land Grants and Patents Thereunder and All Other Patents When the Rights of Others Become Involved in Any Proceeding.

POINT V

Where the Register and Commissioner Have Both Refused to Act and the Secretary on a Timely Appeal Has Refused to Decide and Take Final Action on an Application for an Oil Lease Under the Amended Act of August 21, 1935, the Courts Can and in This Case Should Then Require the Issuance of Such Lease, as the Oil for Which the Lease Is Sought Is the Property of the United States and Not the Property of the Patantee of the Surface Because the Oil Did Not Pass Under the Patent Issued Under the Act of March 3, 1851 (9 State. 631) on a Mexican Land Grant.

ARGUMENT.

POINT I

Where the Register Refuses to Receive an Application for an Oil Lease and the Commissioner Rejects an Appeal to Him Therefrom, Then the Secretary on a Timely Appeal Is Required to Grant an Oral Hearing to the Applicant as Part of Due Process of Law and the Courts Can Require the Secretary to Grant Such a Hearing.

Although mandamus is abolished by the Civil Procedure Rules, similar relief is still available and the substantive rights of the parties are governed by principles which were formerly applied in mandamus cases. *Allison* v. *I. C. C.*, 70 App. D. C. 375, 107 F. (2d) 180, 67 W. L. R. 1162; *Levine* v. *Farley*, 70 App. D. C. 381, 107 F. (2) 186, 67 W. L. R. 899.

If the Secretary's denial of a permit or lease under this statute is not reviewable by the Courts as held by the Court of Appeals clearly then his action is a judicial proceeding, and unquestionable the denial of an opportunity to be heard orally, to present evidence, and make argument, either personally or by counsel, in any and all judicial proceedings is a denial of due process of law under the numerous decisions of this court too well known to require citation.

If the lower court's construction that an applicant is not entitled under the statute to an oral hearing nor to a review of the Secretary's final action is correct, then the statute is clearly not constitutional. The lower court is wrong or the statute is wrong.

Under the general practice and the statutes in issue as part of due process of law, the Petitioner was entitled to have an *oral argument* and hearing.

In *Tri-State Broadcasting Co.* v. *F. C. C.*, 68 W. L. R. 86, at 87, 71 App. D. D. . . . . ; 107 F. (2d) 956, the Court stated:

"Obviously oral argument under the statute is an important right to a party claiming it will suffer economic injury from an additional facility allowed by the commission. It might very well induce the commission to make one finding when without such argument it may have made a contrary finding. *Right of argument is an indispensable step to a fair hearing. Morgan* v. *United States,* 298 U. S. 468; 80 L. Ed. 1288; *Shields* v. *Utah-Idaho Central R. Co.,* 305 U. S. 177; 83 L. Ed. 111." (All italics in this brief are supplied.)

In *Morgan* v. *United States,* above, the Court stated:

"If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing."

In *Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117; 70 L. Ed. 404, the Court said:

"It is next objected that no opportunity was given to the petitioner to be heard in reference to the charges upon which the committee acted in denying him admission to practice. We think that the petitioner having shown by his application that being a citizen of the United States and a certified public accountant under the laws of a state, he was within the class of those entitled to be admitted to practice under the board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the board provide that 'the board *may,* in its discretion, deny admission, suspend or disbar any person'. *But this must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing and opportunity to answer for the* applicant *as would constitute due process. Garfield* v. *United States,* 32

App. D. C. 153, 158; *United States ex rel. Wedderburn* v. *Bliss*, 12 App. D. C. 485; *Phillips* v. *Ballinger*, 37 App. D. C. 46, 51.

"The petitioner as an applicant for admission to practice was, *therefore, entitled to demand* from the board the *right to be heard* on the charges against him upon which the board has denied him admission."

In *Shields* v. *Utah-Idaho Central R. R. Co.*, above, the Court said:

"The language of the provision points to definitive action. The Commission is to '*determine*'. The Commission must determine '*after hearing*'. The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts'. The 'hearing' is 'the hearing of evidence and argument'. *Morgan* v. *United States*, 298 U. S. 468, 480, 80 L. Ed. 1288, 1294, 56 S. Ct. 906. And the manifest purpose in requiring a hearing *is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91, 57 L. Ed. 431, 433, 33 S. Ct. 185."

The word "may" in the Rules of Practice (see index) is subject to the Supreme Court decision construing the word "may" in *Supervisors* v. *State Bank*, 71 U. S. 435; 4 Wall. 435; 18 L. Ed. 419, as the Rules were adopted after the decision as *executive legislation.* Besides, the discretion allowed in the rules is as to time and manner of argument and hearing and *not an absolute denial of argument* and hearing contrary to due process of law.

In the above case the statute provided that the board "*may, if deemed advisable, levy a special tax*" and the court held that it was *mandatory.* This decision was approved in *U. S.* v. *Cornell Steamboat Company*, 202 U. S. 192; 50 L. Ed. 991, and in quite a number of Circuit

Courts of Appeals and state court cases given in Rose's notes to this case.

This case is quoted to some extent under Point III of this brief (p. 16).

The rule that where the Supreme Court construes a statute and then the statute is amended, the court's construction is read into the amended statute and is obligatory on the courts (*Bardwell* v. *Petty*, 52 App. D. C. 310, 286 Fed. 772), should apply, and we think does apply, to a general phrase which is used in a statute and is then construed by the court and is afterwards used in legislation or rules promulgated by departments under authority of legislation, which really is legislation; the construction of the phrase prior thereto is obligatory on the courts in construing the later statute or rule.

POINT II

Where Under Such Circumstances After a Brief Is Filed Before the Secretary by Applicants and the Secretary Denies a Hearing and Refuses to Decide and Take Final Action on the Application, the Courts Can Require the Secretary to Decide the Application and Take Final Action Thereon.

It is alleged (R., 3) that the Secretary had refused to decide or act on the application.

It is very important to this petitioner as well as the other nine applicants that there be a speedy determination of their applications as it is stated hereinafter that California is granting different parties off-shore permits to dip under the land covered by some of the applications so that they can withdraw oil which will belong to the applicants under the leases which they should be given. The Secretary had the appeal from October 13, 1938, and though continually urged for a hearing and a decision, he delayed any action and finally on August 30, 1939, refused to act or decide the application.

The record in the Land Office shows that the Respondent had long prior thereto indefinitely postponed

any action on the 28 Toplon similar applications; of this the Court takes *judicial notice*, for the Court stated in *Red Canyon Sheep Co.* v. *Ickes*, 69 App. D. C. 27, at 31, 98 F. (2d) 308:

> "The appellees requested the trial court, and in their brief request this Court, to take *judicial notice* of the proceedings in the Interior Department relating to the Harvey application for an exchange. *This we may do.* Cf. *Santa Fe Pac. R. R.* v. *Payne*, 50 App. D. C. 95, 267 F. 653 (1920); *United States* v. *Brewer-Elliott Oil & Gas Co.*, 249 F. 609 (D. C. W. D. Okl., 1918)."

On some of the ten applications the Register noted that the Secretary had given them prior instructions not to receive such applications; these instructions are a complete answer to respondent's contention that the Congressional Resolutions introduced in the spring of 1939 were the reason for his refusal to act. Such contention is without merit.

It is well settled that when a court or administrative agency refuses to take jurisdiction, to decide the matter, or to take final action, mandamus lies to require it to do so. Respondent should be made to act or to issue the lease.

In *I. C. C.* v. *Humboldt*, 37 App. D. C. 266, at 278, the Court said:

> "It is elementary law that a writ of mandamus will issue to require an inferior court to assume jurisdiction of and decide a matter within its jurisdiction and pending before it for judicial determination, but the writ will not issue to control its decision. *Ex parte* Flippin, 94 U. S. 348, 24 L. Ed. 194; *Ex parte* Denver & R. G. R. Co., 101 U. S. 711, 25 L. Ed. 872; *Ex parte Burtius*, 103 U. S. 238, 26 L. Ed. 392; *Ex parte Morgan*, 114 U. S. 174, 29 L. Ed. 135, 5 Sup. Ct. Rep. 825."

In affirming this decision this Court (224 U. S. 478, at 485; 56 L. Ed. 849, at 854) said:

> "In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to so do as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the court of appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission 'to take jurisdiction of said cause and proceed therein as by law required'. In other words, to proceed to the merits of the controversy, at which point the Commission stopped because it was 'constrained to hold', as it said, 'upon authority of the decision recently announced *in Re* Jurisdiction over Rail & Water Carriers operating in Alaska, 19 Inters. Com. Rep. 81, that the Commission is without jurisdiction to make the order sought by complainant', the steamship company."

In *Roughton* v. *Ickes,* 69 App. D. C. 324, at 329, 101 F. (2d) 248, the Court said:

> *"If the Secretary refused to act, a different picture would be presented and mandamus would lie to compel him to act initially."*

POINT III

The Issuance of an Oil Lease by the Secretary Under the Amended Act of August 21, 1935, is a Ministerial Duty and Is Required by Statute and on the Secretary's Refusal or Failure to Issue the Lease, the Courts Can Require Such Issuance.

In *West* v. *Alling,* 58 App. D. C. 329; 30 F. (2d) 739, the Court of Appeals held that where an applicant for a permit to prospect for oil and gas pursuant to the *authority* of the leasing act sufficiently qualifies as a citizen of the United States, the Secretary of the Interior *is powerless to refuse such applicant a permit* or to make

any rule or regulation which interferes with the right of such applicant.

Mr. Justice Stephens, in the Red Canyon case, above, at page 32, says the West case on the question of "authorize" was impliedly overruled by *McLennan* v. *Wilbur,* 283 U. S. 414; 75 L. Ed. 1148. Since the McLennan decision in 1931 the Act (Title 30, Sections 221 and 226, U. S. C. A.) has been amended by the Act of August 21, 1935, and the words "and directed" were inserted after the word "authorized" in Section 13, evidently to meet the decision in *McLennan* v. *Wilbur,* above.

In *Red Canyon Sheep Co.* v. *Ickes,* 69 App. D. C. 27, 98 F. (2d) 308, the Court, through Mr. Justice Stephens, construing the grazing act, said:

> "To support the proposition that the Act and regulations grant *rights* to participation in the use of the range, the appellants point to the provision of Section 3, 43 U. S. C. A., sec. 315b, 'That the Secretary of the Interior is hereby authorized to issue * * * permits * * * ', and particularly to the word *authorized,* citing *United States Sugar Equalization Board* v. *P. De Ronde & Co.,* 3 Cir. 7 F. (2d) 981 (1925), and *West* v. *United States,* 58 App. D. C. 329, 30 F. (2d) 739 (1929). The De Ronde Case holds that the word *authorized,* as used in a Joint Resolution of the Congress, 42 Stat. 1226, *although diplomatic* and *permissive in form,* was *mandatory in fact.* And the holding of the West Case, involving the provision of the Leasing Act of 1920, 30 U. S. C. A., sec. 221, 'That the Secretary of the Interior is *hereby authorized* * * * to grant to any applicant qualified under this Act a prospecting permit * * * ', *necessarily implies* that the word *authorized* as there used is *mandatory.* In reply the appellees rely upon *United States ex rel. McLennan* v. *Wilbur,* 283 U. S. 414, 51 S. Ct. 502, 75 L. Ed. 1148 (1931). That case involved the same provision of the Leasing Act as did the West Case and since in the Wilbur Case the Court refused to grant a writ of mandamus against the Secretary of the Interior to compel him to receive and to act upon applications for prospect-

ing permits, the case impliedly overrules the West Case. Cf. *Wann* v. *Ickes*, 67 App. D. C. 291, 92 F. (2d) 215 (1937). The *view* of the *Supreme Court* in the Wilbur Case *seems to be* that the word *authorized* is *not necessarily mandatory;* and the Court's reasoning is inconsistent with the broad language of the Third Circuit in the De Ronde Case. But we think that none of these cases can be said to control the construction of the statute here involved. Whether *authorized* is to be construed as mandatory or permissive is a question which must be determined in the light of the context and purpose of the particular statute in which it is used."

In the Roughton Case, 101 F. (2d) 266; 69 App. D. C. 324, plaintiff applied for an oil and gas prospecting permit, the case holding incidentally that the old system of prospecting permits was abolished by the act. The dispute involved the interpretation of amended sections 13 and 17, and they were construed together to the effect that if the application had priority and was pending 90 days *before* the passage of the act the duty was mandatory, if not, the duty was discretionary.

The McLennon case continued sect. 13 and did not construe Section 17, which latter uses the word "may" and not the word "authorize". Section 13 as amended after the decision provides that the Secretary "is hereby authorized *and directed* * * * to grant to any applicant qualified under this act a *prospecting permit.*

* * * * *

Provided further, that any application for any *prospecting* permit filed *after 90 days* prior to the effective date of this amendatory act *shall* be considered as an application for lease under Section 17 hereof."

The word "shall" is mandatory.

Then Section 17 provides "all lands subject to distribution under this act *which are known* or believed to have contained oil or gas deposits, *except as herein other-*

wise provided, may be leased * * * by competitive bidding".

It will be noted that the word "may" is used and that there is *provision for other leases on land where it is not known* that there is oil or gas and on which there is *no provision for public bidding.*

Section 17 also provides "leases hereafter issued under this section *shall* be for a period of *five years* and so long thereafter as oil or gas is produced in paying quantities when the lands to be leased are *not within any known geological* structure of the producing oil or gas field, and for a period of *ten years* and for so long thereafter as oil and gas is produced in paying quantities when the lands leased are *within any known* geological structure of a producing gas and oil field.

* * * * *

Provided further, that the person first making application for the lease of any land *not within any known geological structure* of a producing oil or gas field who is qualified to hold a lease under this act, including *applicants for permits* whose applications were filed after 90 days prior to the effective date of this amendatory act *shall* be *entitled to a preference right* over others to a lease of such land *without competitive bidding".*

If preference ("shall" is used) mandatory, then right to lease is mandatory.

Clearly the words "authorized and directed" in Section 13 are mandatory and they certainly apply to applications for prospecting permits. As Section 17 authorizes a lease to the applicants for permits, giving them a preference right without competitive bidding, Congress must have intended that "authorized and directed" in Section 13 was *applicable to all the five year preference leases on land not known to contain oil;* Congress would hardly give a preference to an applicant for a permit over an applicant for a lease.

Furthermore, Section 17 uses the word "may" and where authority is given to a public officer, this Court has said, "*What they are empowered to do* for a third person the *law requires* to be done". (4 Wall. 435, cited below.)

Congress having changed "authorized" to "authorized and directed" in Section 13 and left "may" in Section 17 when it knew that this Court under such conditions had construed "may if deemed advisable" to be mandatory, clearly intended Sections 13 and 17 to be mandatory. See *U. S.* v. *Hermanos* hereinafter as to effect of amendments.

The word "may" as used in the statute is mandatory, as third parties and the public are interested.

In *Supervisors of Rock Island County* v. *United States ex rel State Bank*, 71 U. S. 435, 4 Wall. 435, 18 L. Ed. 419, the Court, at 422, said and held:

> "That act declares that 'the board of supervisors under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, *may, if deemed advisable*, levy a special tax'."
>
> * * * * *
>
> "The counsel for the respondent insists, with zeal and ability, that the authority thus given involves no duty; that it depends for its exercise wholly upon the judgment of the supervisors, and that judicial action cannot control the discretion with which the statute has clothed them. We cannot concur in this view of the subject. Great stress is laid by the learned counsel upon the language '*may, if deemed advisable,*' * * * which accompanies the grant of power and, as he contends, qualified it to the extent assumed in his argument.
>
> "In *King* v. *Inhab. of Derby, Skin.*, 370, there was an indictment against 'divers inhabitants' for refusing to meet and make a rate to pay 'the constables tax'. The defendants moved to quash the indictment, 'because they are not compellable, but

the statute only says that they may, so that they have their election, and no coercion shall be'. The Court held that 'may' *in the case of a public officer*, is tantamount to 'shall', and if he does not do it, he shall be punished upon an information, and though he may be commanded by a writ, this is but an aggravation of his contempt.

"In *Rex and Regina* v. *Barlow*, 2 Salk. 609, there was an indictment upon the same statute, and the same objection was taken. The court said: 'When a statute directs the doing of a thing for the sake of justice or the public good, the word 'may' is the same as the word 'shall': thus, 23 Hen. VI, says *'the sheriff may take bail'*. This is *construed* he shall, for he is compellable to do so.

"These are the earliest and leading cases upon the subject. They have been followed in numerous English and American adjudications. The rule they lay down is the *settled law of both countries.*

"In *Mayor of N. Y.* v. *Furze*, 3 Hill 614, and in *Mason* v. *Fearson*, 9 How. 248, the words, *'it shall be lawful'*, were held also to be mandatory. See *Atty. Gen.* v. *Lock*, 3 Atk. 164; Blackwell's Case, 1 Vern. 152; Dwar. Stat. 712; *Malcom* v. *Rogers*, 5 Cow. 188; *Newbury T. Co.* v. *Miller*, 5 Johns. Ch. 113; *Js. of Clark Co. Ct.* v. *T. Co.*, 11 B. Mon. 143; *Minor* v. *Mech. Bank*, 1 Peters 64; *Com.* v. *Johnson*, 2 Binn. 275; *Virginia* v. *Justices*, 2 Va. Cas. 9; *Ohio ex rel.* v. *Gov. Chase*, 5 Ohio St. 53; *Coy* v. *Lyons*, 17 Iowa 1.

"The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, *or an equivalent language*—whenever the public interest or *individual rights call for its exercise*—the language used, though permissive in form, is in fact *peremptory. What they are empowered to do for a third person, the law requires shall be done.* The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right and to prevent the failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless.

"In all such cases it is held that the intent of the legislature, which is the test, was not to devolve

a mere discretion, but to impose 'a positive and absolute duty'.''

Whenever third persons or the public have an interest in having done that which is prescribed by the Legislature, then the act is mandatory, even though words permissive, as "may" are used, instead of words mandatory, as "shall". *Lapsley* v. *Merchants' Bank of Jefferson City,* 78 S. W. 1095, 1096, 105 Mo. App. 98.

The great weight of authority is to the same effect. *Smalley* v. *Paine,* 116 S. W. 38, 39, 102 Tex. 304; *Ex parte* Young, 95 S. W. 98, 102, 49 Tex. Cr. R. 536 (citing Lewis' Sutherland Stat. Const., Sec. 636; *Tarver* v. *Commissioners' Court,* 17 Ala. 527; *United States* v. *Cornell Steamboat Co.,* 137 Fed. 455, 458, 69 C. C. A. 603 (quoting and adopting definition given in *Rock Island County* v. *United States ex rel. State Bank,* 4 Wall. (71 U. S.) 435, 18 L. Ed. 419.

Under Sections 13 and 17 (Title 30, Sections 221 and 226), being part of the amended act of 1935, under which the leases are sought, by the wording of the statute, the land need not be owned by the United States, but only the oil under the land.

Mandamus is the proper remedy for compelling the Secretary of War to perform the wholly ministerial duty of issuing adjustment compensation certificates. *Lowry* v. *Woodring,* 69 App. D. C. 348.

In *U. S. Borax Co.* v. *Ickes,* 98 Fd. (2d) 271, 68 App. D. C. 399, at 409, the Court said:

> "The law is settled that 'Where the duty (of an administrative officer) in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus'."

Construing a statute does not prevent the act from being ministerial.

In *McAlester-Edwards Coal Co.* v. *Fall,* 277 Fed. 573, 51 App. D. C. 171, at 175, the Court said:

"The Secretary refuses to perform a purely ministerial act, solely upon a construction which he places upon the law, and insists that the court has no power in this sort of proceeding to disturb his conclusion. No discretion is committed to the Secretary in respect of the performance of the duties imposed by the statute in this case. The right of appellant company to purchase the land under one or the other appraisement is absolute, and the court is not foreclosed from deciding which the Secretary should apply.

"This case, we think, falls squarely within the rule announced in *Roberts* v. *United States*, 176 U. S. 221, 231, 20 Sup. Ct. 376, 44 L. Ed. 443, and quoted with approval in the recent case of *Lane* v. *Hoagland*, 244 U. S. 174, 182, 37 Sup. Ct. 558, 560 (61 L. Ed. 1066), as follows:

" 'Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. *Every statute to some extent requires construction by the public officer whose duties may be defined therein.* Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that *does not necessarily* and in all cases *make* the *duty* of the officer anything *other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer.* Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and, therefore, it was not ministerial, and the court would on that account be powerless to give relief. *Such a limitation of the powers*

of the court, we think, *would be most unfortunate*, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, or how plainly they violated their duty in refusing to perform the act required.'"

This case was affirmed in *Work* v. *McAlester-Edwards Coal Co.*, 262 U. S. 200; 67 L. Ed. 949, with the same quotation at p. 208 (p. 952).

The petitioner is clearly entitled to the lease as applied for and under the statutes and the facts as alleged, it is purely a ministerial duty on the part of the Secretary to issue same.

The Secretary of the Navy, with whom the Secretary of the Interior joined last year, took the position that the Government owned all the oil in the three-mile limit beyond low tide water and asked Congress to authorize a suit to declare same.

After the hearings on the Congressional Resolutions, Petitioner was informed that the Department of Justice was preparing to bring suits against certain parties, taking exactly the same position that the Petitioner takes in this case, that is, that the oil under land which has been patented to homesteaders did not pass under the patent; the patent did not carry the oil under the land and that the same still belongs to the United States under its long established policy. Since the decision in the Court of Appeals, Petitioner is informed that the Government, in condemnation suits filed at Long Beach by it, claims the oil but will pay for the surface and improvements.

The Solicitor of the Interior Department, as alleged in the complaint, had held that such oil did not pass under such patents (R., 2).

In the famous Standard Oil case the decision of Secretary Ickes (55 L. D. 121, 532, also 51 L. D. 141),

holding that the oil did not pass by the patent, has been sustained by the United States District Court, 21 Fed. Supp. 643, and by the Circuit Court of Appeals, 107 F. (2d) 402 (C. C. A. 9). *Certiorari* was denied, then the United States asked for a writ and then the Company asked for a rehearing; both were denied March 25, 1940 (309 U. S. 654, 84 L. Ed. 642, 645).

A further discussion of the Standard Oil case and the principle that the oil did not pass with the patent, with citations will be found under Point V of this brief.

In amended section 13 it is "provided further that any application for any prospecting permit *filed after* 90 days prior to August 21, 1935, shall be considered as an application for a lease under Section 17".

That clearly provides for leases for 2,500 acres under section 13 and the issuance of leases or permits under Section 13 was not prevented by the amended act. Sections 13, 14, 17 and 28 are all parts of the same act and are read together.

It is clear that the appellant is entitled to a lease and Section 17 as amended provides for leases within an approved cooperative or unit plan of development and operation.

The word "may" as used in the statute is mandatory, as third parties and the public are interested.

Section 13 used "authorized" and in 1935 Congress added "and directed", but Section 17 uses "may".

POINT IV

The Secretary, as Well as the Courts, Can and Should Construe Mexican Land Grants and Patents Thereunder and All Other Patents When the Rights of Others Become Involved in Any Proceeding.

In *United States* v. *O'Donnell,* 303 U. S. 501; 82 L. Ed. 980, the Court not only held it could, but did construe two different patents, one under a Mexican land

grant of which the United States became assignee, and another patent under the Swamp Land Act issued to the State of California and assigned to the respondent. The Swamp Lands patent was issued by mandamus, and the Court stated:

> "The respondents in 1928 by mandamus compelled the Secretary to certify the lands for patent to the State of California. The Court, in awarding the relief sought, at the same time declared with reference to the contentions made here, 'the mere issuance of patent to California determines no legal or equitable right of the United States in the premises.' *Work* v. *United States*, 57 App. D. C. 309, 23 F. (2d) 136, 138.
>
> * * * * *
>
> "But the adjudication in mandamus that it was the duty of the Secretary to issue the patent under these acts and the issuance of it, *determined no legal or equitable right of the United States in the premises. It remains open to the United States in this or any other appropriate proceeding, to show that the lands did not pass under the Swamp Lands Act. United States ex rel. McBride* v. *Schurz*, 102 U. S. 378, 404, 26 L. Ed. 167, 174; *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 636, 641, 646, 26 L. Ed. 875, 876, 878; *United States* v. *Conway*, 175 U. S. 60, 68, 44 L. Ed. 72, 75, 20 S. Ct. 13, and cases cited; see *Work* v. *United States, supra* (57 App. D. C. 309, 23 F. (2d) 137, 138).
>
> "In answering, it will be an aid to adequate understanding of the points in issue to *consider first the effect of the confirmation by the Board.*"

The Court held that under the Mexican land grant patent *only legitimate titles* under the Mexican law at the date of the treaty passed and quoted the treaty as follows:

> "Conformably to the law of the United States, legitimate titles to every description of property,

personal and real, existing in the ceded territories are those *which were legitimate titles under* the Mexican law in California * * * up to the 13th day of May, 1846 * * * 61st Cong., 1st Sess., Sen. Doc. No. 357, pp. 1119, 1120."

This decision has an extensive discussion of Mexican land grants and patents thereunder.

In *De Guyer* v. *Banning*, 167 U. S. 723; 42 L. Ed. 340, the Court not only held that it could, but in that case it did, construe a patent as to what passed under the patent which patented the San Pedro ranch under a Mexican land grant. In this case the Court construed the term "third person" as follows:

> *"The term 'third person', as there used, does not embrace all persons other than the United States* and the claimants, *but only those who hold superior titles,* such as will *enable* them to *resist* successfully any *action* of the *government* in disposing of the property."

Solicitor Margold, in his opinion of October 1, 1936, approved by Assistant Secretary Walters, said:

> "The general rule is clear enough that the act of an executive officer in issuing *a patent cannot convey an interest which the law reserves,* that a patent absolute on its face is *necessarily qualified* by the *limitations of the statute* under which it issues, and that such limitations are, in effect, a part of the patent.
>
> As was said in the case of *Swendig* v. *Washington Co.*, 265 U. S. 322, 332, 68 L. Ed. 1036, in which the Supreme Court held that a *patent absolute* on its *face* was *qualified* by a *departmental regulation* continuing in force a revocable right of way previously granted to a third party:
>
> 'The fact that the patents did not have thereon a notation of the prior permit is not controlling. * * * *The issuing of the patents without a reserva-*

tion did not convey what the law reserved. They are to be given effect according to the laws and regulations under which they were issued.'

To the same effect, see *Stoddard* v. *Chambers,* 2 How. 284, 318; 11 L. Ed. 269; *Chambers* v. *Atchison, T. & S. F. Ry.,* 255 Pac. 1092 (Ariz.).

In *United States* v. *Joyce,* 240 Fed. 610, the patent made no reference to the act of July 4, 1884 (23 Stat. 76), under which application for the patent had been made, and omitted the required declaration that the property should be held in trust for 25 years. Nevertheless, the Court held that the patent was subject to restraints upon alienation specified in that act.

To the same effect, see:

United States v. *Hammer,* 195 Fed. 790, rev'd on other grounds, 204 Fed. 898, 241 U. S. 379, 60 L. Ed. 1055.

Felix v. *Yaksum,* 77 Wash. 519, 137 Pac. 1037.

Taylor v. *Brown,* 5 Dak. 335."

In *United States* v. *Barnes,* 222 U. S. 513, at 520; 56 L. Ed. 291, at 293, the Court said:

"Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as customs, internal revenue, public lands, Indians, and patents for inventions; and *it is the settled rule of decision* in this court that where there is subsequent legislation upon such a subject, it *carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary appears.*"

Dunbar Line Co. v. *Utah-Idaho S. Co.,* 17 F. (2d) 351 (C. C. A., 8), held that *under* the *settled policy of the government* mineral lands, *unless expressly included,* are *excluded* from grants to states and further held that *the statute must be read in the light of the settled public policy,* citing *U. S.* v. *Barnes,* above.

Solicitor Margold, in the same opinion, stated:

> "In issuing a patent, *the Executive branch* of the Government acts *not* as a *principal but* as an *agent*, deriving its entire authority from Acts of Congress. *Shaw* v. *Kellogg*, 170 U. S. 313; 42 L. Ed. 1050. Under familiar principles of agency, a third party dealing witht an agent *may not rely* upon acts which exceed the limits of the agent's authority, if he has actual or constructive notice of those limits. Tiffany on Agency, sec. 19."

In *Deffeback* v. *Hawke*, 115 U. S. 392; 29 L. Ed. 423, the Court held that it would seem that there may be an entry of a town site, even though within its limits mineral lands are found, the entry and the *patent being inoperative as to all lands* known at the time to be valuable for its minerals, or discovered to be such before their occupation and improvement for residences or business under the town-site title.

In *Steel* v. *St. Louis S. & R. Co.*, 106 U. S. 447; 27 L. Ed. 226, the Court held that the *patent*, like the deed of an individual, *is inoperative if* the *government* never owned the property, or had previously conveyed it, *or had dedicated it to uses* which precluded its sale.

In *Mullan* v. *United States*, 118 U. S. 271 at 278-9; 30 L. Ed. 170 at 173, the Court held and said:

> "The list was *certified without authority of law* and, *therefore, by a mistake against which relief in equity may be afforded.* As was said in *United States* v. *Stone*, 2 Wall. 535 (69 U. S. bk. 17, L. Ed. 767): *'The patent is but evidence of a grant and the officer who issues it acts ministerially and not judicially.* If he issues *a patent for land reserved from sale by law*, such patent *is void* for want of authority. But one officer of the land office is not competent to cancel or annul the act of his prede-

cessor. This is a judicial act, and requires the judgment of a court.' That language is equally applicable to the present case, and its correctness has been often recognized. *Moore* v. *Robbins*, 96 U. S. 533 (Bk. 24 L. Ed. 850); *United States* v. *Schurz*, 102 U. S. 396 (Bk. 26 L. Ed. 171); *Steel* v. *Smelting Company*, 106 U. S. 454 (Bk. 27 L. Ed. 229); *Moffat* v. *United States*, 112 U. S. 24 (Bk. 28 L. Ed. 623)."

POINT V

Where the Register and Commissioner Have Both Refused to Act and the Secretary on a Timely Appeal Has Refused to Decide and Take Final Action on an Application for an Oil Lease Under the Amended Act of August 21, 1935, the Courts Can and in This Case Should Then Require the Issuance of Such Lease, as the Oil for Which the Lease Is Sought Is the Property of the United States and Not the Property of the Patantee of the Surface Because the Oil Did Not Pass Under the Patent Issued Under the Act of March 3, 1851 (9 State, 631) on a Mexican Land Grant.

The allegations of the complaint under the Civil Procedure Rules are sufficient to show that the Secretary is determined not to decide these appeals if he can avoid it. Therefore, he is clearly liable to be ordered to take action or the Court, in its discretion and in equity, can decide the matter and enter an order requiring the Secretary to issue the lease.

It is merely a ministerial act and the respondent has done all in his power to prevent the issuance of such leases as the respondent had before the ten applications were filed, given the local register instructions to refuse to receive such applications. This being shown by the records of these 10 and 28 other applications in the respondent's office, of which this Court takes notice (Red Canyon case, above), makes it clear that the respondent has acted arbitrarily and capriciously and will do so again.

The Secretary should not be permitted to again act arbitrarily and capriciously and as he had given instructions, before the applications were filed to refuse such applications, *it seems only fair and equitable that the petitioner should not be required to go back before him,* but this Court should now require that the respondent forthwith issue the lease applied for to the petitioner.

The petitioner is clearly entitled to the lease applied for under the authorities and arguments set out in her brief before the respondent, which brief is in part as follows:

* * * * *

As suggested by Mr. Edelstein in your behalf, we are herewith enclosing a brief on the above ten appeals with an additional brief just covering 1101.15 acres of the Klint, Fitzgerald and Makee application (Case No. 2). We wish to call special attention to the drawing filed with the brief.

We are informed that the State of California *is granting offshore permits to dip under the lands covered by these applications* for leases so as to withdraw the oil before these applications are granted. For this reason it is *very urgent* that the appellants be granted a hearing immediately and *that the leases be ordered to issue to the appellants.*

We are informed that oil belonging to the United States of a value largely in excess of $4,000,000,000 has been illegally withdrawn from lands covered by the applications and other similarly situated land and is still being so illegally withdrawn.

* * * * *

The above ten appeals are on applications filed by the appellant for oil leases, which the Register and the Commissioner refused to receive, file or consider.

It is alleged and claimed that the oil, gas and other

minerals on the property mentioned in each application have not been leased or patented to any other individual and are still owned by the United States. The appeals call for the construction of certain patents under Mexican land grants and others *and do not seek the cancellation of any patent.*

The application and appeal of Klint, Fitzgerald and McKee, which we refer to as Case No. 2, seeks a lease on land, the soil but not the minerals and oil of part of which were patented to certain parties, but a considerable portion of which was not, under a Mexican land grant or patent thereon *and portions have not been patented to anyone* or oil leases granted to anyone by the United States. As to this Case No. 2, we will file an additional brief as to the portions of land in the said application that were not patented under a Mexican land grant.

* * * * *

The Secretary can hear the full case and decide the whole matter now, although there was no hearing before the Register or the Commissioner, and he can have such hearing when there is not any appeal under the accepted practice, for in *West* v. *Standard Oil Company*, 278 U. S. 200 at 213; 73 L. Ed. 265 at 271, the Court said:

> "We agree that if Secretary Fall had determined as a fact that the land was not then known to be mineral, his order dismissing the proceedings would have had the same legal effect as if it had followed the more formal procedure prescribed by Circular No. 460. For the Secretary is not obliged to employ proceedings in the local land office as the means for making the determination as to the known mineral character. *He could himself hear the evidence in the first instance. Nor is he obliged, in so ascertaining the facts, to follow a procedure similar to that prescribed for the local land office.* See *Knight* v. *United Land Asso.*, 142 U. S. 161, 177, 178, 35 L. Ed. 974, 979, 980."

See *Hawley* v. *Diller,* 178 U. S. 476, 44 L. Ed. 1157, 20 Sup. Ct. Rep. 986; *Lake Superior Ship Canal R. & I. Co.* v. *Patterson,* 30 Land Dec. 160; *Re* Lafollette, 26 Land Dec. 453.

The Register and the Commissioner should not arbitrarily have refused a hearing to the appellants, as they are clearly entitled to a hearing, and we are confident that the Secretary will grant us a hearing forthwith, as he surely does not want to be put in the same class as former Secretary Fall. In *West* v. *Standard Oil Company,* above, the Court said at page 221, 275:

> "When Secretary Fall undertook to determine, not as a fact whether the land was known to be mineral in 1903, but as a proposition of law, that, because of other conceded facts, the company's title had become unassailable, he acted without authority; and the order of dismissal based thereon did not remove the land from the jurisdiction of the Department."

Patents under Mexican Land Grants only conveyed such title as Mexico would have given had the land not been ceded, as decided and ordered by Secretary McClellan in construing the Mexican treaty on August 25, 18.., as follows:

> "It is obligatory on the government of the United States to deal with the previous land titles and the 'pueblos' precisely as Mexico would have done had the sovereignty not changed. We are bound to recognize all titles as she would have done —*to go that far and no further.* This is the principle which you will bear in mind in acting upon these important concerns."

The Secretary in his report for 1849 stated:

> "By the laws of Spain these *mines did not pass by a grant of the land,* but remained in the Crown, subject to be disposed of according to such ordi-

nances and regulations as might be from time to time adopted. *Any individual might enter upon the lands of another to search for ores* of the precious metals; and, having discovered a mine, he might register and thus acquire the right to work it *on paying to the owner the damage done to the surface,* and to the Crown, whose property it was, a fifth or tenth, according to the quality of the mine. If the finder neglected to work, or worked it imperfectly, it might be denounced by any other person, whereby he would become entitled.

"This right to the mines of precious metals, which by the laws of Spain, remained in the Crown, is believed to have been also *retained by Mexico* while she was sovereign of the Territory, and to have *passed by her transfer to* the United States. It is a *right* of the sovereign in the *soil as perfect* as if it had *been expressly reserved in the body of the grant,* and it will rest with Congress to determine whether, in those cases where lands duly granted contain gold, this right shall be asserted or relinquished. *If relinquished, it will require an express law* to effect the object; and, *if retained, legislation will be necessary* to provide a mode by which it shall be exercised."

These two constructions of the treaty by the Secretary of the Interior were not changed by the Act of March 3, 1851 (9 Stats. 631), nor by the amendment of January 10, 1854 (10 Stats. 603), and therefore, such constructions became obligatory upon the Courts as well as upon the Department by the decision in *United States Borax Company* v. *Ickes,* 68 App. D. C. 408-9; 98 F. (2d) 271, and the citations therein and the following cases:

In *United States* v. *Hermanos,* 209 U. S. 338, 52 L. Ed. 821, the Court said:

"And we have decided that the re-enactment by Congress, *without change,* of a *statute* which had *previously* received long continued *executive con-*

struction, is an *adoption by Congress of such construction. United States* v. *G. Falk & Bro.,* 204 U. S. 143, 51 L. Ed. 411, 414, 27 Sup. Ct. Rep. 191."

In *Bardwell* v. *Petty,* 52 App. D. C. 310 at 311, 286 Fed. 772, the Court held and said:

> "Legislation once judicially, or even administratively, interpreted, if left for a long period of time unchanged, unmodified, or unamended, may well justify the conclusion that the judicial or administrative interpretation was in accord, and not at variance, with the legislation intention. *Stuart* v. *Laird,* 5 U. S. (1 Cranch) 298, 308, 2 L. Ed. 115; *United States* v. *Midwest Oil Co.,* 236 U. S. 469, 473, 35 Sup. Ct. 309, 59 L. Ed. 641; *United States* v. *Baruch,* 223 U. S. 191, 200, 32 Sup. Ct. 306, 56 L. Ed. 399; *Edwards* v. *Darby,* 25 U. S. (12 Wheat.) 206, 209, 6 L. Ed. 603; *Hahn* v. *United States,* 107 U. S. 402, 406, 2 Sup. Ct. 494, 27 L. Ed. 527; *United States* v. *Philbrick,* 120 U. S. 52, 59, 7 Sup. Ct. 413, 20 L. Ed. 559; *Robertson* v. *Downing,* 127 U. S. 607, 613, 8 Sup. Ct. 1328, 32 L. Ed. 269; *United States* v. *Healey,* 160 U. S. 136, 141, 16 Sup. Ct. 247, 40 L. Ed. 369; *United States* v. *Hermanos,* 209 U. S. 337, 339, 28 Sup. Ct. 532, 52 L. Ed. 821; *Komada* v. *United States,* 215 U. S. 392, 396, 30 Sup. Ct. 136, 54 L. Ed. 249.

In *United States* v. *Southern Pacific Co.,* 251 U. S. 1 at 7; 64 L. Ed. 97 at 100, the Court said:

> " 'All mineral lands' other than those containing coal or iron were excluded from the grant, and this exclusion embraced oil lands. *Burks* v. *Southern P. R. Co.,* 234 U. S. 669, 676-679, 58 L. Ed. 1527, 1543, 1544."

The United States only confirmed such title as the claimant and the Mexican Government would have, or could have been given by Mexico under her laws at the date of the treaty had the treaty not been entered into and the land had remained in Mexico. In *DeGuyer* v. *Banning,* 167 U. S. 723 at 740; 42 L. Ed. 340 at 346, the Court said:

"In the second place, the *patent* is a *record* of the *action* of the *government* upon the *title* of the claimant *as it existed upon* the *acquisition of the country.* Such *acquisition did not affect the rights of the inhabitants to their property.* They retained all such rights, and were entitled by the law of nations to protection in them *to the same extent as under the former government.* The treaty of cession also stipulated for such protection."

* * * * *

"In *Teschemacher* v. *Thompson,* 18 Cal. 11, 25, 26, (79 Am. Dec. 151), the court, after referring to the statute of 1851, said: 'As the last act in the series of proceedings, a patent is to issue to the claimant. This instrument is not only the deed of the United States, but it is a solemn record of the government of its action and judgment *with respect to the title of the claimant existing at the date of the cession.*'"

Under the Mexican law, by the mining ordinance, mines belonged to the Supreme Government and were handled by a different department from the grants of agricultural or vacant lands, which latter grants could be made by the Governor or Territorial Assembly and all of the grants coming before the Commission and Court under the Act of March 3, 1851, were of agricultural lands and in the original Mexican grants they were restricted to agricultural lands or purposes. *Our statutes and decisions* have *always recognized* and *maintained* a *strict distinction* and difference between *mineral lands* and *agricultural lands.*

Lindley on Mines, 3d Ed., volume 1, page 199, says:

"Under the laws in force in Mexico at the date of the Treaty of Guadalupe Hildago, mines, whether in public or private property, belonged to the supreme government."

Castillero v. *United States*, 2 Black 17, 167-169; 17 L. Ed. 360, sets out the Mexican laws and the case holds that mines did not pass under the grants by the Governor and Territorial Assembly of agricultural lands.

In *United States* v. *San Pedro & Canon Del Aqua Co.*, 17 Pac. 337, 404; 4 N. M. 405, the Court held and said:

> "Certain decrees were in force at the time of the separation of Mexico from Spain, whereby the mines of gold, copper, and silver were held by the crown of Spain. Upon the separation, which resulted in creating Mexico a separate government, the title to all mines within her territory passed to and vested in the Mexican government, including therein what is now New Mexico. *A grant of land by the Mexican government did not carry such mines. It did not require a reservation by the government of such mines to prevent them from passing. No interest in such mines, whether in granted or ungranted land,* could be *acquired* by the individual citizen, under the Spanish or Mexican law, *except through mining ordinances.* The law of those countries recognized the title to all such mines, whether in public or granted land, as in the governmnt, *and not* subject to be passed out of it by a mere grant. (Rock, Sp. & Mex. Law, 124-127, 130, 131, 411; Hall, Mex. Law, nos. 1210-1213, 1235; *Moore* v. *Smaw*, 17 Cal. 199, 12 Min. R. 418, 424-428). We conclude then that by the grant of the land in controversy by the Mexican Government to Jose Serafin Raminez of the Canon Del Agua no interest and title in and to such mines therein contained was vested in him and as it does not appear by the record that any individual interest in such minerals had been obtained by him or those claiming under him, by virtue of the mining ordinances of the Mexican nation, *and by the cession passed*, with all other property of Mexico, *to the United States*, that these minerals were at that date the property of the Mexican nation, *and by the cession passed*, with all other

property of Mexico within the limits of New Mexico, *to and became the property of the United States. Moore* v. *Smaw,* 17 Cal. 199."

This case was affirmed by this Court, 146 U. S. 120; 36 L. Ed. 912.

Also in *Moore* v. *Smaw,* 17 Calif. 216, the Court said:

> "The minerals were vested under the Spanish monarchy in the crown, and * * * after the separation from Mexico, in that nation * * * did not pass, as we have already stated, by the ordinary grant of land *without express words of designation.* Such grant transferred only an interest in the soil, distinct from that of the minerals. The interest in the minerals was conveyed through the operation of the mining ordinances, by registry of discovery, or by proceedings upon denouncement, when a mine once discovered had been forfeited or abandoned. * * * They constituted, therefore, at that time the property of the Mexican nation, and by the *cession passed to the United States.*"

Counsel opposing the leases in the 28 other applications in their brief urged that there was an exception in the patent as to the rights of third parties and in naming one exception excluded the others, but they overlooked the well recognized principle that *exceptions* in the United States statute as well as exceptions in different statutes in Mexico are all *read into the patent* and that the rights of the grantee from the Mexican Government were only such rights as he could obtain from the Mexican Government at the date of the treaty. That Mexican law and the treaty are read into the patent. That the *Court and Commission* under the Act of 1851 *had no jurisdiction of grants,* or rather leases, *of mines* in Mexico is well established.

In the case of *Fremont* v. *United States,* 17 How. 565, 15 L. Ed. 241 at 249, the Court said:

> "In the relation to that part of the argument which disputes the right on the ground that the grant embraced mines of gold and silver, it is sufficient to say that under the mining laws of Spain, the discovery of a mine of gold or silver did not destroy the title of the individual to the land granted. The only question before the court is the validity of the title. And *whether* there be *any mines* on this land, and if there be any, what are the *rights of sovereignty* in them, are *questions which* must be discussed in another form of proceedings, *are not subjected to the jurisdiction of the Commissioners or the Court, by the Act of 1851.*"

This case was followed by *Boggs* v. *Merced Mining Company,* 14 Cal. 311, holding that Mexican mining reservations, rights and properties passed under the treaty to the United States as a public right and also that neither the Commission nor the Court had jurisdiction to pass on minerals.

It is also followed in *United States* v. *Maxwill Land Co.,* 26 F. 118 at 122 (C. C.—Colorado)

Solicitor Margold in his opinion of March 7, 1934, says:

> "In brief, under the mining laws of Spain and Mexico, Indians enjoyed the same status and privilege as persons of Spanish descent."

Then he held that the Papago Indians had no interest in the minerals in the lands they occupied before and after the cession to the United States.

Thus, as the Indians were equal to the Mexicans as to status and privilege in the mines and they did not obtain any interest in the minerals clearly the Mexicans of Spanish descent did not obtain any interest in the minerals.

In *Pueblo of Santa Rosa* v. *Lane*, 46 App. D. C. 411 and 56 App. D. C. 259, 12 F. (2d) 332, *the Secretary in his answer made* the *same contention* that the Papago Indians did not take any interest in the minerals and this *contention* was *sustained* by the Court of Appeals; the decision of this Court, (273 U. S. 316; 71 L. Ed. 658), went off on another point.

This Court denied *certiorari* in *Los Angeles* v. *San Pedro, etc. R. Co.*, 182 Cal. 652, 189 Pac. 449, where the Court *held* that a *patent to shore lands* should ordinarily be construed as *excluding* therefrom the land below the high-tide line which belongs to the state by virtue of its sovereignty in the absence of an express showing to the contrary. A patent to public lands, like every other grant by the sovereign, is construed strongly in favor of the grantor under the rule embodied in Civ. Code, sec. 1069. The Court said:

> "The first is that a patent should ordinarily be construed as excluding therefrom land below the high-tide line. The rule is thus stated in *Wright* v. *Seymour*, 69 Cal. 122, 10 Pac. 323:
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> 'The lands under water where the tide ebbs and flows belong to the state by virtue of her sovereignty and in the absence of an express showing to the contrary it will not be presumed that the government of the United States intended to convey it. * * * We must assume that the government discharged its obligation to the holder of the Mexican title by receiving proof of its character and the land to which it related, and that upon confirmation the patent issued to the claimant is the evidence and only evidence of the extent of the grant, and the terms used in such patent relating to extent and boundaries *are subject to like rules of construction with other grants from the government.* Had the government found the claimant entitled to the bed and banks of a tidewater stream, we must suppose it *would have used in the patent apt words for its conveyance.* Not having done so, the presumption is, that it was not intended to convey the bed of the stream.'

"In *Carver* v. *S. P., L. A. & S. L. Ry. Co.,* (C. C.) 151 Fed. 334, it is held that a grant from the sovereign of land bounded by the sea or by any navigable tidewater does not pass any title below high-water mark unless the language of the grant or long usage under it clearly indicates that such was the intention.

"The other rule of interpretation is a corollary thereto, namely that *every grant by the sovereign is construed strongly in favor of the grantor.* The rule is thus stated in our Code, section 1069, Civil Code:

'A grant is to be interpreted in favor of the grantee except that a reservation in any grant, and *every grant by a public officer* or body, as such, to a private party, is to be *interpreted in favor of the grantor.*'

This rule of construction was applied by the Supreme Court of the United States in *Shively* v. *Bowlby,* 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, where it was said:

'It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded by tide-water and would have been the same if the grantor had been a private person. *But this is not so.* The *rule of construction* in the case of such a *grant from* the *sovereign* is *quite different* from that which governs *private grant.* The familiar rule and its chief foundation were felicitously expressed by Sir William Scott; "All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away." ' " (*Certiorari denied* 245 U. S. 636.)

In *United States* v. *Sweet*, 245 U. S. 562 at 567 and 572; 62 L. Ed. 472 at 478 and 480, the Court held and said:

> "In the legislation concerning the public lands it has been the practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines, *and to withhold mineral lands from disposal save under laws especially including them.* This practice began with the ordinance of May 20, 1785, 10 Journals of Congress, Folwell's Ed. 118, and was observed with such persistency in the early Land Laws as to lead this court ot say in *United States* v. *Gratiot*, 14 Pet. 526, 10 L. Ed. 573; *'It has been the policy of the government, at all times, in disposing of the public lands, to reserve the mines for the use of the United States;'* and also to hold in *United States* v. *Gear*, 3 How. 120 11 L. Ed. 523, that *an act making no mention* of *lead-mines lands* and providing generally for the sale of 'all the lands' in certain new land districts, 'reserving only' designated tracts, 'any law of Congress heretofore existing to the contrary notwithstanding,' *could not be regarded as disclosing a purpose* on the part of *Congress to depart* from *'the policy which had governed its legislation* in respect to lead-mine lands,' and so *did not embrace them.* A like practice prevailed in respect of saline lands, and in *Morton* v. *Nebraska*, 21 Wall. 660, 22 L. Ed. 639, 12 Mor. Min. Rep. 451, where a disposal of such lands under an act providing generally for the sale of lands in certain territories was drawn in question, this court said that it could not be supposed *'without an express declaration to that effect'* that Congress intended by such an act to permit the sale of saline lands and thus to depart from *'a long established policy* by which it had been governed in similar cases.' "
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> "What has been said demonstrates that the school grant to Utah must be read in the light of the Mining Laws, the school Land Indemnity Law, *and*

the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will. *United States* v. *Barnes,* 222 U. S. 513, 520, 56 L. Ed. 291, 293, 32 Sup. Ct. Rep. 117. When it is so read it does not, in our opinion, disclose a purpose to include mineral lands. *Although couched in general terms adequate to embrace such lands if there were no statute or settled policy to the contrary, it contains no language which explicitly or clearly withdraws the designated sections, where known to be mineral in character,* from the operation of the Mining Laws, or which certainly *shows* that *Congress intended to depart from its long prevailing policy* of disposing of mineral lands only under laws specially including them. It therefore must be taken as neither curtailing those laws nor departing from that policy."

It is the contention of petitioner and nine other applicants that none of the grants and patents issued to the lands involved carried or included any of the minerals, gases or oil and that the said minerals, gases and oil were excluded from the patent and remained in the United States and became and are the property of the petitioners under their said oil applications.

United States v. *Southern Pacific,* 251 U. S. 1; 64 L. Ed. 97, held that grants under the Act of Congress of July 27, 1866 (14 Stat. 292), excluded from the patent and grants thereunder petroleum and minerals, oil and all mineral lands except iron and coal lands, and thus followed and approved *Burke* v. *Southern Pacific,* 234 U. S. at 669; 58 L. Ed. 1527. *Diamond Coal and Coke Company* v. *United States,* 233 U. S. 236; 58 L. Ed. 936, held that mineral land, including coal lands, are not subject to acquisition under the homestead law (Rev. Stat. paragraphs 2302, 2318, 2319, 2347-51).

The Secretary of the Interior in *United States* v. *Standard Oil Company* (Sacramento 021879), on January 24, 1935, "*spelled out*" from the statutes exclusion

of minerals from grants and patents and he said (55 L. D. 121 at 532):

> "The Act of March 3, 1853 (10 Stat. 246), which provides for the grant of the sixteenth and thirty-sixth sections of each township of public land in California to that State, *does not expressly except mineral land from the terms of the grant. Such an exception, however, was early spelled out by judicial construction* (*Mining Company* v. *Consolidated Mining Company,* 102 U. S. 167) and has been adhered to ever since in a long line of decisions involving the California and a similar Utah statute. *Mullens and another* v. *United States,* 118 U. S. 27 (1886); *United States* v. *Sweet,* 245 U. S. 563 (1918); *Work* v. *Braffett,* 276 U. S. 560 (1928); *Johnson* v. *Morris,* 72 Fed. 890 (C. C. A. 9th, 1886); *Milner* v. *United States,* 228 Fed. 431 (C. C. A. 8th, 1915), appeal dismissed, mem. decision 248 U. S. 594; *Dunbar Lime Co.* v. *Utah-Idaho Sugar Co.,* 17 F. (2d) 351 (1926); *Hermocilla* v. *Hubbard,* 89 Cal. 5, 26 P. 611 (1891); *Utah* v. *Allen, et al.,* 27 L. D. 53 (1898); *State of* Utah, 32 L. D. 117 (1903). *The exception, therefore, is too firmly entrenched to be uprooted save by legislative action.* Such action actually has been taken, but *express provisions* in the pertinent legislation *admittedly perpetuate* the exception in a situation such as is presented in this case. See Act of January 25, 1927, 44 Stat. 1026, as amended May 2, 1932, 47 Stat. 140, 43 U. S. C., sec. 870."

The hearing in the above case was authorized by the decision in *West* v. *Standard Oil Company,* 278 U. S. 200; 73 L. Ed. 265, reversing 57 App. D. C. 329, 23 F. (2d) 750 and sustaining the ruling in 51 L. D. 141 and 145, which is quoted from above.

Under the Secretary's decision above, the Government brought suit and in *United States* v. *Standard Oil Company,* 21 Fed. Supp. 645 (D. C.—Calif.) the ruling of the Secretary was sustained and the Government recovered the oil illegally taken under the grants and pat-

ents, being the grants to the State of California under the statute above mentioned; this decision was affirmed in 107 F. (2d) 402 (C. C. A., 9).

The final denial on March 25, 1940, of a writ of *certiorari* by this Court (309 U. S. 654; 84 L. Ed. 642, 645) to that decision sustaining the Secretary's ruling that the oil there did not pass with the patent sustains the contentions of the petitioner that the oil here belongs to the United States and petitioner, being a qualified applicant, is entitled to a lease, notwithstanding the patent to the surface land.

There is absolutely no question of title to land involved or raised in this cause, nor is the validity of the patents attacked. In *Putnam* v. *Ickes*, 64 App. D. C. 339, 78 F. (2d) 223, the validity of the patent as well as of the title to land was attacked and the Court held the six-year statute of limitations barred an atack on the patent.

In the opinion of Solicitor Margold of October 1, 1936, approved by Assistance Secretary Walters, it is held that where the Secretary is construing a patent or the Government is suing to enforce its equitable rights against parties who had a patent but are seeking to take and withhold property and rights not conveyed by the patent, the six year statute of limitations is not applicable. The Solicitor cites the following cases which fully sustain his opinion:

Ind. C. & C. Co. v. *United States*, 274 U. S. 640; 71 L. Ed. 1270 (which was followed in *U. S.* v. *Carbon C. L. Co.*, 284 U. S. 534; 76 L. Ed. 469).

U. S. v. *N. O. P. Ry.*, 248 U. S. 507, 510, 518;
U. S. v. *Joyce*, 240 Fed. 610 (C. C. A.-8).
Pitan v. *U. S.*, 241 Fed. 346 (C. C. A.-8).
U. S. v. *Lee Wilson Co.*, 214 Fed. 630 (D. C.-Ark.).

CONCLUSION.

From the foregoing authorities it seems clear that the Secretary denied the petitioner due process of law when he refused petitioner an oral hearing and further that under the facts alleged and those of which judicial notice was taken, there was no justification for the Secretary's refusal to act on the applications of the petitioner and the nine other applicants.

As the respondent had similarly postponed action in twenty-eight similar applications a year or more prior to the time the petitioner and associates first filed their applications in 1938 and as the act is mandatory and respondent's duty to issue the lease is only a ministerial act and it being clear under the law as well as the "established policy" of the United States that the oil sought belongs to the United States, this Court should grant the writ of *certiorari* and reverse the judgment under review with instructions that the District Court issue an order requiring the respondent to issue the oil lease applied for by the petitioner.

Respectfully submitted,

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September 18, 1940.